Filed 2/19/19 P. v. Hernandez CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE SANCHEZ HERNANDEZ, Defendant and Appellant.	H044870 (Santa Cruz County Super. Ct. No. 16CR06862)

A jury convicted defendant Jose Sanchez Hernandez of felony cultivation of marijuana (Health & Saf. Code, § 11358, count 1)[1] and misdemeanor possession of marijuana for sale (§ 11359, count 2). The jury also found that Hernandez was armed with a firearm during the commission of a felony. (Pen. Code, § 12022, subd. (a)(1).) Hernandez argues the trial court erred in failing to instruct the jury on simple possession of marijuana as a lesser included offense of possession of marijuana for sale and in omitting an element of the crime in the instruction for the crime of cultivation of marijuana. Hernandez also claims his trial counsel was ineffective for failing to make the trial court aware that, pursuant to Proposition 64, his conviction for cultivating marijuana was a misdemeanor. Finally, Hernandez argues that one of his conditions of probation,

[1] Unspecified statutory references are to the Health and Safety Code.

which provides that he "[n]ot [ ] knowingly be in possession of . . . indicia of marijuana cultivation or production or sales," is unconstitutionally vague and overbroad.

We agree with Hernandez's claims of instructional error and conclude these errors were prejudicial. We therefore reverse Hernandez's convictions for counts 1 and 2 and remand for possible retrial. The Attorney General concedes, and we agree, that Hernandez could only be convicted of a misdemeanor offense for cultivation of marijuana. In the event that the District Attorney elects to retry Hernandez on count 1, Hernandez can only be charged with the misdemeanor offense, which renders inapplicable the allegation that Hernandez was armed with a firearm during the commission of a felony. In light of these conclusions, we do not address Hernandez's constitutional challenge to his probation condition.

I. FACTS AND PROCEDURAL BACKGROUND

Hernandez, along with two codefendants,[2] was charged by information with felony cultivation of marijuana (§ 11358, count 1), misdemeanor possession of marijuana for sale (§ 11359, count 2), misdemeanor diversion of a stream (Fish & G. Code, § 1602, count 3), misdemeanor depositing a substance deleterious to plant or animal life (Fish & G. Code, § 5650, subd. (a)(6), count 4), causing a hazardous substance to be deposited on a road, street, or highway (Pen. Code, § 374.8, subd. (b), count 5), misdemeanor trespass (Pen. Code, § 602, subd. (m), count 6), felony conspiracy (Pen. Code, § 182, subd. (a)(1), count 7), and misdemeanor resisting a peace officer (Pen. Code, § 148, subd. (a)(1), count 8). The information further alleged that Hernandez was armed with a firearm while committing felony cultivation of marijuana. (Pen. Code, § 12022, subd. (a)(1).)

Hernandez's jury trial took place in May 2017 and elicited the following facts. Sometime in early 2016, Tyson Quintal, a warden with the California Department of Fish

[2] These codefendants are not parties to this appeal.

and Wildlife (DFW), was patrolling in the Santa Cruz mountains near Highland Way in Los Gatos when he observed a black "poly" pipe running underneath the road. At the time he discovered it, the pipe did not appear to have been used, although Quintal testified that, in his experience, such a pipe would be used to divert water from a creek for illegal cultivation.

When Quintal returned to the area on June 14, 2016, the pipe appeared to be in use. He followed the pipe downhill from Highland Way to where it intersected a well-worn trail which led to an area where marijuana plants were growing. Quintal obtained permission from the landowners to enter the property to eradicate the plants and detain any suspects.

On June 28, 2016, Quintal and others from DFW, Cal Fire, and the National Guard returned to the property. DFW warden Mark Imsdahl was assisting in the operation when he encountered Hernandez walking down a trail carrying a bag. Officers knocked Hernandez to the ground and, as Hernandez rolled onto his stomach, Imsdahl ordered him to put his hands behind his back so that Imsdahl could handcuff him. Imsdahl struggled with Hernandez. Hernandez's shirt came up, and another officer observed a handgun tucked into Hernandez's waistband. The other officer retrieved the pistol, and Imsdahl handcuffed Hernandez. Imsdahl looked in the bag that Hernandez had been carrying and found "two bags of processed marijuana bud inside." There was no testimony regarding the actual weight of these bags. Imsdahl and Quintal testified that growers typically package processed marijuana into one-pound bags. Officers arrested five people, including Hernandez, in the operation. There was no testimony that any of the people arrested at the scene other than Hernandez were armed.

Codefendant Jesus Aguilar was interviewed by officers and said that he was at the site "to tend to the marijuana plants and make sure they weren't stolen." Officers asked if Aguilar would be paid for his services, and Aguilar said he would, but he did not know

how much. Aguilar claimed he had just arrived at the site the night before after some friends told him they would take him to a "party."

Quintal testified he and his team cut down 6,637 marijuana plants on the property, but they also recovered an unspecified amount of marijuana that was in various stages of processing. Officers also found two digital scales and packaged marijuana on site. In Quintal's experience, the marijuana being grown at this location would be worth "around a thousand dollars" per pound and each plant would generate approximately one pound of marijuana. In addition to the marijuana plants, scales, and processing materials, officers discovered a tent, clothing, and a cooking area. DFW later returned to the property "with a lot of manpower and a helicopter[,]" to remove approximately 2,400 pounds of trash.

The jury heard no evidence discussing whether the quantity of marijuana Hernandez personally possessed in the two bags was consistent with an amount of marijuana possessed for personal use or, alternatively, whether the quantity he possessed suggested Hernandez was involved in the sale or cultivation of marijuana. Hernandez did not testify.

Julio Ramos testified for the defense, stating that he has known Hernandez for more than 10 years. Ramos and Hernandez met in Alcoholics Anonymous, and Ramos considered Hernandez to be a good father and an honest person.

After the close of evidence, the prosecutor argued that "this was an organized effort to grow marijuana in substantial qualities. We heard testimony . . . as to the amount . . . of money that could be earned from this [*sic*] 6,000 plants. I think it was around $6 million. There's no issue as to whether someone's cultivating marijuana. The law in California has changed. There is a certain—a small amount of plants that people can grow, but they can't grow 6 million [*sic*] plants."

The jury found Hernandez guilty of felony cultivation of marijuana (§ 11358, count 1) and misdemeanor possession of marijuana for sale (§ 11359, count 2). The jury also found true the special allegation that Hernandez was armed with a firearm in the

commission of a felony (marijuana cultivation) in violation of Penal Code section 12022, subdivision (a)(1). The jury acquitted Hernandez of the misdemeanor charges of diverting a stream (Fish & G. Code, § 1602, subd. (a), count 3), depositing a substance deleterious to animal and plant life (Fish & G. Code, § 5650, subd. (a)(6), count 4), depositing a hazardous substance on land of another (Pen. Code, § 374.8, subd. (b), count 5), criminal trespass (Pen. Code, § 602, subd. (m), count 6), and resisting a peace officer (Pen. Code, § 148, subd. (a)(1), count 8).

At sentencing, the trial court suspended imposition of sentence and placed Hernandez on formal probation for three years. The trial court ordered Hernandez to serve 180 days in the county jail and imposed other conditions of probation, including that Hernandez "[n]ot . . . knowingly be in possession of . . . indicia of marijuana cultivation or production or sales."

Hernandez timely appealed.

II. DISCUSSION

A. *Instructional Error*

1. Simple Possession of Marijuana as a Lesser Included Offense

Defense counsel requested and the trial court agreed to instruct the jury on simple possession of more than an ounce of marijuana (§ 11357, subdivision (b)) as a lesser included offense of count 2, possession of marijuana for sale (§ 11359). However, while instructing the jury, the trial court—despite expressly referring to simple possession as a lesser included offense to possession for sale, as well as indicating that instructions and separate verdict forms addressing lesser included offenses would be forthcoming—failed to provide any instructions related to simple possession.[3] There is no explanation in the

[3] No verdict form related to simple possession appears in the record on appeal. A Clerk's Certificate, dated December 7, 2017, from the Santa Cruz County Superior Court Clerk indicates that, although unsigned verdict forms are part of the normal record on appeal, no such forms could be found in the superior court file.

record on appeal why the trial court failed to instruct the jury on the elements of simple possession of marijuana.

Hernandez argues that the failure to instruct the jury on simple possession violated his due process rights and was not harmless error. We agree that the trial court erred in failing to instruct the jury and conclude that the error was prejudicial.

A trial court has a "duty to instruct on 'all theories of a lesser included offense which find substantial support in the evidence.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 866–867 (*Rogers*).) "Substantial evidence" is evidence from which a jury composed of reasonable persons could conclude that the defendant committed the lesser offense, but not the greater. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*), [abrogated on another ground by statute].) "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*Id*. at p. 177.)

In the context of a noncapital case, the failure to instruct on a lesser included offense is an error of California law, which we review under the test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*Breverman, supra*, 19 Cal.4th at p. 165.) "Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of. [Citations.]" (*Rogers*, *supra*, 39 Cal.4th at p. 868.)

Hernandez argues that, when the defense has requested an instruction as it did here, the trial court's failure to instruct on a lesser included offense must be reviewed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18. We disagree. *Breverman* makes clear that such instructional error, at least in noncapital cases, does not implicate the United States Constitution. (*Breverman, supra*, 19 Cal.4th at p. 165.) The trial court's duty to instruct on lesser included offenses applies regardless of whether counsel requests such an instruction. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) Although *Breverman* addressed a trial court's sua sponte duty to instruct on lesser

included offenses and here Hernandez requested the instruction, we see no qualitative difference in the nature of the error committed by the trial court. We therefore review the error under *Watson*.

Based on the record before us, it is reasonably probable that the jury, had it been instructed on the lesser included offense of simple possession, would have found Hernandez guilty of that offense rather than the greater offense of possession of marijuana for sale. As an initial matter, we note that, under *Breverman*, the trial court necessarily must have concluded that substantial evidence supported the lesser included offense when it agreed to provide that instruction to the jury. (*Breverman*, *supra*, 19 Cal.4th at p. 162.) We agree that there was substantial evidence in the record that supported a conviction for simple possession rather than possession for sale. Hernandez was apprehended carrying two bags of marijuana near the marijuana plots, but there was no evidence, other than his presence and the gun, linking him to the marijuana cultivation operation itself.

The jury heard no evidence that the marijuana Hernandez personally possessed was inconsistent with an amount for personal use. As a matter of common sense, a reasonable juror could conclude that the approximately 6,600 marijuana plants being grown at the site were being grown for sale, but the jury heard little testimony linking Hernandez to those plants. Significantly, the jury acquitted Hernandez of several counts more closely related to operating the marijuana farm, namely the misdemeanor charges of diverting water and depositing harmful or hazardous substances. These acquittals suggest that the jury at least partially rejected the prosecution's view that Hernandez was part of the larger operation.

While there was also substantial evidence from which a reasonable juror could have convicted Hernandez of the charge in count 2, given the paucity of evidence related to Hernandez's personal role, the lack of evidence about personal use amounts of marijuana, and the jury's rejection of many of the counts linking Hernandez to the overall

operation of the marijuana farm, it is reasonably probable that the jury would have convicted Hernandez of simple possession had it been instructed on this charge. For these reasons, we conclude that the failure to instruct the jury on simple possession of marijuana as a lesser included offense of possession of marijuana for sale was not harmless error, and we reverse Hernandez's conviction on count 2.

2. Cultivation of Marijuana as Amended by Proposition 64

Under former section 11358, cultivation of any amount of marijuana was a felony. As amended by Proposition 64, effective November 9, 2016, it is no longer illegal for a person over the age of 18 to cultivate up to six marijuana plants. (§ 11358, subd. (c).) Hernandez argues that the jury should have been instructed pursuant to the amended version of section 11358 that, in order to convict him of count 1, they must find beyond a reasonable doubt that he cultivated more than six marijuana plants. We agree that the trial court should have instructed the jury under the amended version of section 11358.

The Attorney General contends that the trial court properly instructed the jury on the law in effect at the time Hernandez committed the offense, i.e., June 2016, rather than the law in effect at the time of his trial in May 2017. The Attorney General's position is inconsistent with well-established principles governing retroactive application of changes to criminal statutes. When an amended criminal statute imposes a lighter penalty than that provided in the pre-existing law, the amendment applies to cases where the court has not yet entered judgment. (*In re Estrada* (1965) 63 Cal.2d 740, 744745 (*Estrada*).) Similarly, when an amendment adds an additional element to a statute, the new requirement applies to defendants whose crimes were committed before the change if their conviction was not yet final absent clear textual evidence that the statute was not intended to apply retroactively. (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 71.) Proposition 64 added an essential element of the offense, namely the number of marijuana plants under cultivation, to section 11358. There is no textual indication in Proposition 64 that the change should not apply retroactively to cases that had not yet

been tried when the changes went into effect. Hernandez's jury should have been instructed on the element of the crime setting out the minimum number of marijuana plants. We next turn to the question whether this error was harmless.

A trial court's failure to instruct the jury on all of the essential elements of the charged offense is reviewed for harmless error according to the standard set out in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*Neder v. U.S.* (1999) 527 U.S. 1, 15 (*Neder*).) The *Chapman* test asks "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*Ibid*.) The California Supreme Court has stated, "*Neder* instructs us to 'conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.' " (*People v. Mil* (2012) 53 Cal.4th. 400, 417, quoting *Neder, supra*, 527 U.S. at p. 19.) For this type of error, "the presumption is that we must reverse, unless we find the error harmless beyond a reasonable doubt." (*In re Loza* (2018) 27 Cal.App.5th 797, 805, italics omitted.)

Having examined the record, we cannot conclude beyond a reasonable doubt that the jury verdict on the charge of unlawful cultivation of marijuana would have been the same had the jury been instructed that it had to find that Hernandez cultivated more than six marijuana plants. As discussed above, Hernandez was arrested at the scene carrying two bags of marijuana, but there was little evidence other than his presence tying him to the overall operation. The jury acquitted him on many of the counts that were directly related to cultivation, i.e. diversion of a stream to irrigate the plants and application of agricultural chemicals, such as insecticides, herbicides, or fertilizer. These acquittals provide evidence that the jury believed Hernandez was only incidentally involved in the operation of this marijuana farm.

While there was ample evidence that this particular marijuana operation was extensive, as well the inference that Hernandez may have been serving as an armed guard from the evidence that he had a gun, we cannot conclude beyond a reasonable doubt that it was harmless error to not instruct the jury on the amended version of section 11358, subdivision (c). We therefore reverse Hernandez's conviction on count 1.

B. *Reduction of the Crime of Cultivation of Marijuana to a Misdemeanor*

In the event that the District Attorney elects to retry Hernandez on count 1, we address Hernandez's argument that he could not have been convicted of a felony for this crime. As discussed above, Proposition 64 amended section 11358 to provide that, absent circumstances not applicable here, cultivation of more than six marijuana plants is a misdemeanor. Hernandez argues that his trial counsel was ineffective for failing to ensure that he was tried and sentenced under the amended version of the statute, and that he should have been sentenced as a misdemeanant rather than a felon.

The Attorney General concedes that Hernandez's conviction for felony marijuana cultivation should be reduced to a misdemeanor under section 11358, as amended, because the judgment was not final when Proposition 64 took effect. We accept this concession. The crime of cultivation of marijuana from a felony to a misdemeanor applies to Hernandez, notwithstanding that he committed the crime before Proposition 64 took effect, because Hernandez had not yet been sentenced when the change to section 11358 was enacted. (See *Estrada, supra,* 63 Cal.2d at p. 745; cf. *People v. Rascon* (2017) 10 Cal.App.5th 388, 395 [holding that a person who had been sentenced *before* the enactment of Proposition 64 "is not yet final is not automatically entitled to the reduction of punishment provided by the amendment to that statute"].)[4] We also observe

[4] In light of this conclusion, we do not reach Hernandez's argument that his counsel was constitutionally ineffective for failing to inform the trial court that it was required to reduce Hernandez's conviction to a misdemeanor pursuant to Proposition 64.

that, as this crime is no longer a felony, on retrial Hernandez cannot be charged with the special allegation that he was armed during the commission of a felony. (Pen. Code, § 12022, subd. (a)(1).)

If the District Attorney elects to retry Hernandez on count 1, it must be properly charged as a misdemeanor (§ 11358) and without the arming enhancement (Pen. Code, § 12022, subd. (a)(1)).

Our conclusions require reversal of both of Hernandez's convictions and dictate that he cannot be retried on the felony crime. As Hernandez will necessarily be resentenced, and in light of the strong possibility that the trial court may not impose the same conditions of probation after retrial on the amended charges, we do not address Hernandez's challenge to the probation condition.

III. DISPOSITION

The judgment is reversed. The matter is remanded for possible retrial on counts 1 and 2, and the trial court is directed to strike the arming enhancement (Pen. Code, § 12022, subd. (a)(1)) attached to count 1.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

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